



BBI Appeal: The Doctrine of Basic Structure Revisited

By Gautam Bhatia



The Court of Appeal's judgment comes in at a formidable 1089 pages, with all seven judges writing separate opinions. Very helpfully, however, the Court has also provided a disposition ([here](#)), that sets out eighteen findings along with the bench-split on each issue. This immediately obviates any confusion about *what* the judgment is, and leaves us free to focus on the Court's reasoning. In brief: on *almost* all significant issues, with fluctuating majorities, the Court of Appeal upheld the judgment of the High Court, and affirmed the finding that the Constitution Amendment Bill 2020 was unconstitutional.

In the following series of posts, I propose to analyse the Court of Appeal's judgment(s), thematically. I will begin with the issue of the basic structure. As the disposition indicates, the Court held that the basic structure doctrine is applicable in Kenya (**6-1**), that it provides an implied limitation upon the amendment process set out in Articles 255 - 257 (**5-2**), and that the basic structure can be altered only through an exercise of primary constituent power - i.e., a recreation of the conditions under which the Constitution was founded, which include a four-step process of civic education, public participation, Constituent Assembly Debate, and a referendum (**4-3**).

Amendment or Repeal: The Heart of the Issue

I will begin with the judgment of Kiage JA, as – in my reading – on the issue of the basic structure, it is the “lead judgment”. Kiage JA’s analysis of the basic structure issue is found between **pgs 5 - 98** of his judgment. At its heart, Kiage JA’s argument is a straightforward one, and follows the logic of basic structure judgments across the world, namely that (a) there is a distinction between “amendment” and “repeal”, and (b) repeal can either be express, or implied. The latter form of repeal can take place through a set of amendments that are fundamentally inconsistent with *the* Constitution as it stands. At **pg 83**, thus, he notes that “*amendments always presuppose the existence of **the** constitution with which they must be consistent, and which they cannot abolish.*”

In my analysis of the arguments before the Court of Appeal, I had pointed out that the Appellants’ reliance on Article 1(1) of the Kenyan Constitution was counter-productive, as the words of that article – “*all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with **this** Constitution*” – presuppose the existence of *this* Constitution; amendments that amount to implied repeal, however, are no longer operating within the framework of “this” Constitution. This is the argument that effectively forms the basis of Kiage JA’s acceptance of the basic structure doctrine: that, just like a house no longer remains a house if you knock down its foundations and pillars (as opposed to merely redecorating it), this Constitution no longer remains *this* Constitution, if your amendments are such that alter its identity.

Direct Democracy under Articles 255 and 257: The Kiage JA/Okwengu JA/Sichale JA Debate

Now, while this argument is a persuasive argument for adopting the basic structure doctrine *per se*, in the Kenyan case there is an added wrinkle. And that is that the ten “core” themes set out under Article 255 *already* require a referendum in case they are to be amended; and furthermore, a “popular initiative” under Article 257 also requires public participation and a referendum. For this reason, the core of the Appellants’ case before the Court of Appeal was that the concerns that the basic structure doctrine sought to address had *already* been addressed within the Kenyan Constitution: by having a mix of representative and direct democracy in its amendment provisions, the framers of the Kenyan Constitution – and, by extension, the People – had provided for an eventuality where any amendment to the basic structure could not be accomplished solely by the representative organs, and would have to go to the People.

Indeed, if we study the dissenting judgment of Okwengu JA, we find that it is precisely this argument that she finds persuasive. In **paragraph 76** of her judgment, Okwengu JA notes that:

This means that the popular initiative is a citizen driven process. In both instances, the people remain involved in both the popular initiative and parliamentary initiative through public participation, and are the ultimate determinant through the referendum process on whether the amendment is carried. (paragraph 76)

Okwengu JA then goes on to note that the “basic structure” of the Kenyan Constitution has already been identified in Article 255 – through the setting out of ten thematic areas that require a referendum if they are to be amended – *and* a specific process for its alteration (involving the People) has been set out:

That is to say that the framers of the Constitution of Kenya, 2010 conscious of these thematic areas as the main pillars forming the basic structure of the Constitution, nonetheless provided a leeway for amendment of these thematic areas, putting in place appropriate safeguards including the peoples’ participation and final decision on the amendment. This is a clear indication that in regard to amendments, the Constitution of Kenya, 2010 is explicit and self-

sufficient. (**paragraph 82**)

We find something similar in the dissenting judgment of Sichale JA. Sichale JA finds particularly persuasive the Appellants' argument that what distinguishes India from Kenya is that Article 368 of the Indian Constitution limits the amending power to a (representative) Parliament, while Articles 255-257 of the Kenyan Constitution explicitly envisage a role *for the People* (**pg 29**). She then goes on to note that the scheme of Articles 255 - 257 specifically respond to the pathologies identified in Kenya's past, and their solution is found within the text itself:

Indeed, the 2010 Constitution was informed by Kenya's dark past and its citizenry were determined "Never Again" shall we have a Constitution that can be amended at will. In the formulation of the 2010 Constitution, a conscious effort was made to ensure that we do not have hyper-amendments. (pg 37)

This is, thus, a powerful argument - commanding the acceptance of two Justices - and one that deserves a response. And in Kiage JA's judgment, we find three responses: conceptual, historical, and theoretical. *Conceptually*, Kiage JA points out - taking forward the argument set out above - that by definition, if you want to *replace* the Constitution instead of *amending* it, you must go *outside* of the Constitution and not *within* it (what the High Court referred to as the primary constituent power) (**pg 59**). *Historically*, Kiage JA endorses the High Court's historical analysis of the detailed public participation that went into the making of the Kenyan Constitution, as well as the desire to avoid hyper-amendments, but he also goes further: he locates a core pathology of post-colonial African constitutionalism as that of excessive centralisation of power within the figure of the President (this is crucial for another aspect of the appeal, which I will deal with in a future post) - and how this centralisation of power enabled various Presidents to shrug off constitutional checks and balances *through the process of amendments*:

It is a sad blight on Africa's post-independence experience that no sooner did the nations gain independence than the power elites embarked on diluting and dissolving all restraints on power and authority, a blurring and final obliteration of checks and balances and a concentration of power in the Presidency. They did this principally through facially legal and constitutionally compliant changes to their constitutions. (pg 53)

Kiage JA goes on to argue that Kenyans were entirely aware of this "in their search for a new constitutional paradigm" (**pg 53**), and that this found reflection in the CKRC Report. Crucially, Kiage JA then uses this argument to segue into his third point, which is a democratic-theoretical point: relying upon the work of Yaniv Roznai and others, he argues that *by themselves*, referenda can be top-down, imposing a set of pre-decided choices upon a passive population. The fact, therefore, that Articles 255 and 257 contemplate a referendum is not sufficient justification to argue that the the reason why the basic structure doctrine exists in the first place has been adequately addressed within the Constitution itself: "*an effective bulwark against abusive constitutionalism therefore seems to me to be, on the authorities, one that entails more as opposed to less people involvement.*" (**p. 96**)

The popular initiative is a citizen driven process. In both instances, the people remain involved in both the popular initiative and parliamentary initiative through public participation, and are the ultimate determinant through the referendum process on whether the amendment is carried

We are now, therefore, in a position to reconstruct the essence of Kiage JA's argument: *first*, that

amendment and repeal are two different things; *secondly*, that therefore, constitutional alterations that fall in the latter category amount to reconstituting the Constitution, and must be taken to the People exercising primary Constituent power; and that *thirdly*, the existing provisions for direct democracy and referenda under Articles 255 to 257 lack the extent and guarantees of public participation that would – in light of Kenyan constitutional history – be sufficient safeguards against abusive constitutionalism. Thus, the High Court’s finding regarding the basic structure doctrine and the four-step participation process is correct and ought to be upheld.

The Analysis of the Other Judges

Now, what of the other judges? In large part, they agree with Kiage J’s analysis (see the analysis of Nambuye JA, **paragraphs 62 - 65**; Kairu JA, **paragraphs 32 - 55**; Tuiyott JA, **paragraphs 25 - 34**). Some additional points are added by Musinga (P). The analysis of Musinga (P) begins at **para 272** of this judgment. Musinga (P) agrees with the basic point that “any amendment that alters constitutional fundamental values, norms and institutions cannot pass as an amendment, it is in the nature of dismemberment” (**paragraph 285**). He then spends substantial time on illustrations: in particular, he focuses on the proposed addition of a judicial ombudsman to the Constitution, a Presidential appointee whose presence, he argues, constitutes an “ingenuous and subtle claw back to the independence of the Judiciary.” (**paragraph 288**). He undertakes a similar analysis for changes in the legislature, which seek to convert Kenya from a Presidential to a hybrid-Presidential system, and to the controversial issue of delimitation, where he finds that the proposed amendments attempt to take away the determination of this question from an independent constitutional body (**paragraph 292**).

Interestingly, Kairu JA – while agreeing with the High Court’s historical analysis and finding on the basic structure – differs as to the application of the doctrine. He finds – along with Okwengu JA on this point – that the basic structure has already been identified by the Constitution, *via* the ten thematic areas of Article 255(1). He then holds that while these provisions may be *amended* (following their stipulated process), there is a complete bar on their “dismemberment”. This actually brings Kairu JA’s finding very close to the classical (or, shall we say, *Indian*) version of the basic structure, and – incidentally – cuts the majority in favour of alteration of the basic structure via the four-step exercise of primary constituent power, to a wafer-thin 4-3.

The Identification of the Basic Structure

One final point: the disposition does not specify the question of what constitutes the basic structure of the Kenyan Constitution. And by my count, there *is* no clear majority on this point. Out of the six judges who agree that the Kenyan Constitution does have a basic structure, a plurality of three (Okwengu, Kairu, and Tuiyott JA) hold that the basic structure is to be found under the ten thematic areas of Article 255; two Justices (Musinga (P) and Kiage JA) agree with the High Court that the enquiry is to be undertaken on a case to case basis; and Nambuye JA does not express an opinion on this point.

As historians of the basic structure doctrine will know, there is something almost deliciously fitting about this.

The Kenyan Constitution’s amendment provisions are singular in their detail, the obvious care with which they have been crafted, and the attention that has gone into their design. There is a reflective mix of representative and direct democracy, and the articulation of a hierarchy of norms within the Constitution – two classic features of the global basic structure doctrine. Despite this, five judges at the High Court and five out of seven at the Court of Appeal ultimately found that despite all this textual detail, there exists an additional, implied limitation upon the amending power, in the form of

the basic structure doctrine.

For the reasons that I have provided in my previous analysis of the High Court judgment, and for the reasons above, I believe that both Courts are correct on this point. It is important to note that the singular Kenyan amendment provisions have called forth a singular solution: departing from global basic structure doctrine, neither the High Court nor the Court of Appeal has held that any provision of the Kenyan Constitution is unamendable *per se*; but rather, even the basic structure can be amended, subjected to procedural and procedural/substantive constraints that aim to replicate the participatory character of its founding.

The framers of the Constitution of Kenya, 2010 conscious of these thematic areas as the main pillars forming the basic structure of the Constitution, nonetheless provided a leeway for amendment of these thematic areas, putting in place appropriate safeguards including the peoples' participation and final decision on the amendment.

But at the end of the day, I believe that the two Courts are correct for an even simpler reason: *the very existence of the BBI and the Constitution Amendment Bill*. The fact that this case came to Court at all shows that notwithstanding the care with which Articles 255 - 257 were crafted, it was *still* possible for to push through far-reaching constitutional changes, via a top-down elite political pact, while still staying within the formal constraints of the Constitution.

Now of course, the counter-argument will be that all the two judgments have actually achieved is replaced the elite political pact with gatekeeping by a judicial elite (and indeed, we find echoes of this fear in Sichale JA's dissent). To this, only one answer can be made: that if future judicial decisions on this point reflect the clarity of reasoning and self-awareness exhibited by these two judgments, then fears of a judicial capture will likely not come to pass; but that, of course, is something that only time will tell. In this sense, the basic structure doctrine is a bit like HLA Hart's famous rule of recognition: nothing succeeds like success.

Published by the good folks at [The Elephant](#).

The Elephant is a platform for engaging citizens to reflect, re-member and re-envision their society by interrogating the past, the present, to fashion a future.

Follow us on [Twitter](#).